though supported by, the consent of the parties.

There is another large class of cases in which it has been held that a delivered award will not be set aside by the court, unless for proper reasons, and that the court above will, in such cases, only look at the record, and, unless it discloses error, affirm the judgment below. Under this head may be classed *Rogers* v. *Playford*, 2 Jones 184; *Buckman* v. *Davis*, 4 Casey 214; *Massey* v. *Thomas*, 6 Binn. 337; *Painter* v. *Kissler*, 9 P. F. Smith 331; *Dickerson* v. *Rorke*, 6 Casey 380; *Robinson* v. *Bickley*, Id. 389. In several of these last cases, it was also decided that an agreement to refer need not contain an agreement to make the submission a rule of court, the latter being implied from the agreement itself. See *Huston* v. *Clark et al.*, 35 Leg. Intel. (Phila.) 48.

A. SYDNEY BIDDLE.

Supreme Court of Missouri.

FERGUSON *v.* BARTHOLOMEW ET AL.

A forcible entry of a claimant into the possession of the premises sued for does not have the effect of suspending the operation of the Statute of Limitations in favor of an adverse claimant; and when restitution is made by law, the period during which the forcible possession was held by the owner will be added to and become a part of the adverse possession of such adverse claimant.

THIS was an action of ejectment, instituted May 1st 1872, for military bounty lands lying in the county of Chariton, Missouri. The plaintiff had judgment in the action. The plaintiff and the defendant claimed through a common source of title. The plaintiff claimed title under a deed from the common grantor, dated March 11th 1822, executed in the state of Tennessee, and recorded in Chariton county April 2d 1842. This deed, when recorded, was neither proven nor acknowledged. Plaintiff connected himself with this conveyance by a regular chain of title-papers, all of which were recorded April 2d 1842, except the deed to himself, which was recorded June 19th 1848. The defendant claimed under a deed executed by the common grantor November 17th 1821, with which he connected himself by a regular chain of conveyances, all of which were recorded March 20th 1868. The defendant also relied on the limitation of two years, applicable to suits for military bounty lands, and proved the following facts:—

"That in the month of October 1868 one Krassig took the possession of the land sued for and built a house on it; that shortly afterwards, and about the time the house was completed, the plaintiff took forcible possession of the house and put his tenants in it; that Krassig took the possession and built the house under a con-

tract for the purchase of the land, made with one Lucius Salisbury, who is one of the grantors in defendant's chain of title; that some months after plaintiff took the possession of the premises from said Krassig, the said Krassig commenced suit against the tenants of said plaintiff, and on the 8th day of February 1869 recovered judgment in forcible entry and detainer against them for said land, before a justice of the peace; that a writ of restitution was issued on said judgment, and was placed in the hands of the proper constable, who, on the 29th day of March 1869, executed the same by putting the said Krassig in possession of the said premises; that on the said day the sale of said land by Salisbury to said Krassig was annulled, and the said Salisbury took the land back from Krassig; that on the said day the said Salisbury rented said premises to one Freeman, who went into the possession thereof, and remained until about the 1st day of March 1870; that about said time the plaintiff again took forcible possession of said premises, and put his tenants on the same; that on the 14th day of April 1870 the said Salisbury commenced a suit for forcibly entry and detainer against Stephen Wilson *et al.*, who were the tenants of plaintiff, before a justice of the peace, and on the 8th day of September 1870 recovered judgment for the possession of said premises; that defendants appealed from said judgment to the Circuit Court of Chariton county, Missouri, where, on the 23d day of May 1871, the said Salisbury again recovered judgment for the possession of said premises, and on the 10th day of July 1871 was put in the possession of said premises by a writ of restitution, issued on said judgment; and that said Salisbury and his grantee, Thomas, one of the defendants in this case, by themselves and tenants, have ever since held the possession of said premises, and made valuable improvements thereon."

It was admitted by the defendants, at the instance of the plaintiff, that the plaintiff commenced an action of ejectment, for the land in suit, in the Chariton Court of Common Pleas, a court of competent jurisdiction, against the tenants of Salisbury, September 1st 1871, which was continued until April 2d 1872, when plaintiff suffered a nonsuit and commenced this action May 1st 1872. Sections 35 to 38 inclusive, of chapter 109 of the General Statutes in relation to conveyances, first enacted in 1843, provide that every instrument of writing executed out of this state and within the United States, which conveys or affects military bounty lands in

this state, and which is acknowledged or proved according to the laws and usages of the place where executed, which has been filed for record and recorded in the proper office, although such filing or recording may not have been in accordance with any law in force, shall impart the same notice as if the acknowledgment or proof had been made in accordance with law; and that certified copies of the said instruments, or of the record thereof, shall, upon proof of the loss or destruction of the original instrument, be read in evidence with like effect and on the same conditions as the original instrument.

By the 35th section of chapter 143 of the General Statutes in relation to evidence, first enacted February 2d 1847, it is provided that the records made by the recorder of the proper county, by copying from any deed of conveyance, that has neither been proven nor acknowledged, or which has been proven or acknowledged, but not in accordance with the law in force at the time the same was done, shall impart notice to all persons of the contents of such instruments, and all subsequent purchasers and mortgagors shall be deemed to purchase with notice thereof.

Waters & Winslow, for appellants.

George W. Easley and *H. Lander*, for respondent.

The opinion of the court was delivered by

HOUGH, J.—In *Crispen* v. *Hannavan*, 50 Mo. 416, it was said that the 35th section of the chapter in relation to evidence, was not applicable to the military bounty lands; but the remarks of the judge who delivered the opinion of the court in that case, must be construed with reference to the character of the conveyances then under consideration. Those conveyances were executed out of the state, and were acknowledged before a notary public, one in the District of Columbia and the other in the state of Kentucky, and the court held that their admissibility as evidence was to be determined by reference alone to the 35th, 36th and 37th sections of the statute of conveyances, relating to military bounty lands; and as there was no testimony showing that at the date of their execution a notary public was authorized to take the proof or acknowledgment thereof, either in the District of Columbia or in the state of Kentucky, they were properly excluded. Of course they could not have been admitted, in any court, under the 35th and 36th

sections of the chapter on evidence, until it was shown that they had not been acknowledged or proven according to law. The laws of the several states are to be proven like other facts, and there was no evidence on that subject.

It was obviously not intended to declare that the 35th section of the chapter on evidence, can in no case be held to include conveyances of military bounty lands. Conveyances executed within this state, for instance, which are neither proven nor acknowledged, would be covered by this section, whether they passed the title to military bounty lands or other lands; and if neither proven nor acknowledged we can perceive no good reason why they should not be held to be included within the provisions of this section, although executed outside of this state.

Those conveyances only are *excluded* from the operation of the 35th section of the statute on evidence, which are *included* in the 35th section of the statute on conveyances; and those included in the latter section are such only as have been executed and acknowledged out of this state, and within the United States according to the law of the place where executed: *Tully* v. *Canfield*, 60 Mo.

That such was the law prior to the passage of the Act of March 22d 1873 (Acts 1873, p. 44) is shown by the opinion of this court in *Totten* v. *James*, 55 Mo. 494, wherein the Act of 1873 was declared to be but a legislative interpretation of sections 35 and 36 of the statute on evidence. That Act of Assembly added nothing in reality to the scope and efficacy of those provisions, and was doubtless prompted by the general character of the remarks made in *Crispen* v. *Hannavan*, which was decided in 1872. As the deed from McKean to Casey was neither proven nor acknowledged at the time it was recorded, April 2d 1842, it clearly comes within the provisions of the 35th section of the statute on evidence, and consequently affected all subsequent purchasers with notice from the 2d February 1847. We are of opinion, therefore, that the paper title of the plaintiff is the better title. This being the case, the plaintiff is entitled to recover, unless the defendants have shown an adverse possession for the period of two years.

The plaintiff contends that his entry and possession thereunder in 1868, and his subsequent entry and possession in 1870, destroyed the continuity of the defendant's possession and interrupted the operation of the statute.

It may well be doubted whether the common-law right of entry,

though apparently recognised in the second section of our Statute of Limitations, has any existence in this state; if it has, it is certainly of no practical importance. Whether the construction, therefore, which has been given to our statute of forcible entry and detainer, which was enacted before the adoption of the common law by us, is such as to make all common-law entries unlawful, need not now be determined, as under our statute no entry can be held to be sufficient or valid as a claim, unless suit be commenced thereon within one year after making such entry, and within the time limited for bringing an action of ejectment. The plaintiff's entries in the present case can, consequently, avail him nothing, even if they could be considered as common-law entries, inasmuch as no suit was commenced by him thereon within one year after they were made. Besides, the entries proven to have been made by the plaintiff, were not, in their character, such as were recognised at common law, as they were made with force and strong hand. Such entries are not only in violation of our forcible entry and detainer law, but they were prohibited by the British statutes in force prior to the fourth year of James the First. "The remedy by entry," says Blackstone, "must be pursued according to statute 5 Ric. 2, stat. 1, c. 8, in a peaceable and easy manner, and not with force and strong hand. For if one turns and keeps another out of possession forcibly, this is an injury of both a civil and a criminal nature. The civil is remedied by immediate restitution, which puts the ancient possessor in *statu quo*:" 2 Com. 179.

A rule which would allow the owner of land to arrest the operation of the Statute of Limitations by a forcible intrusion upon the peaceable possession of an adverse occupant, and his expulsion from the premises, would be followed by the most pernicious consequences. Violence and disorder would speedily ensue, and for the peaceful methods of the law would be substituted the hostile conflicts of opposing claimants. If the owner of land wrest the possession by force from the adverse occupant, when restitution is made by law, the period during which the forcible possession was held by the owner will be added to, and become a part of, the adverse possession of such occupant: *Robinson* v. *Walker*, 50 Mo. 19; *Pella* v. *Scholte*, 24 Iowa 283.

It follows from the foregoing views, that the forcible intrusion of the plaintiff into the possession of the premises sued for, did not suspend the operation of the Statute of Limitations, and on the

adverse possession shown by the defendant he was entitled to a verdict. The judgment will be reversed and the cause remanded.

The question decided in the above reported case is one of unusual interest and importance. Without deciding that there is no such thing in Missouri as a common-law entry which would suspend the operation of the Statute of Limitations, the court holds that a *forcible* entry would not have that effect. We cannot consider the reasoning by which this conclusion is reached as altogether satisfactory. An entry at common law did not have the effect of ousting the occupant. There was no particular form required. The purpose of it was to give notice of the claim of the person making the same, and the effect of it was to suspend the running of the statute. Why would not a *forcible* entry have this effect as well as a *peaceable* one? The answer of the court is, because a forcible entry is an injury of both a civil and criminal nature, the civil injury being remedied by immediate restitution, which puts the ancient possessor in *statu quo*. This is undoubtedly the true rule as regards the actual possession; but after the owner has been punished by being turned out of possession, what good reason is there for denying him the benefits of a common-law entry, which may be said to be embraced in a forcible entry? In other words, if a mere naked entry would suspend the operation of the statute, why would a forcible retention of possession annul the effect of such entry? Why should the greater exclude the lesser? It is said by the court that to allow a forcible entry to suspend the operation of the statute would be to encourage violence and disorder. This would be the case, provided there be no common-law entry which would have this effect; but if there be such common-law entry, then the pursuit of the same, instead of resorting to a forcible entry, is sufficiently sanctioned by the consideration that the latter is punishable by restitution of the premises. This view, however, would not change the result in this particular case, in view of the fact that suit was not brought in one year after the entry was made, as required by statute.

H. B. JOHNSON.

Supreme Court of the United States.

GEORGE W. JONES, APPELLANT, *v.* THE UNITED STATES.

Time is usually of the essence of an executory contract for the sale and subsequent delivery of goods, where no right of property in the same passes by the bargain from the vendor to the purchaser.

Whether one promise be the consideration for another, or whether the performance and not the mere promise be the consideration, is to be determined by the intention and meaning of the parties, as collected from the instrument and the application of good sense and right reason to each particular case.

Where an act is to be performed by the plaintiff before the accruing of the defendant's liability under his contract, the plaintiff must prove either his performance of such condition precedent or an offer to perform it which the defendant rejected, or his readiness to fulfil the condition until the defendant discharged him from so doing or prevented the execution of the matter which the contract required him to perform.